

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
BEFORE THE DIVISION OF ADMINISTRATIVE LAW JUDGES**

JAM PRODUCTIONS, LTD. and EVENT)
PRODUCTIONS, INC.,)

and)

THEATRICAL STAGE EMPLOYEES)
UNION LOCAL NO. 2, IATSE,)

Complainant,)
)

Case No.: 13-CA-177838

**EMPLOYER'S BRIEF TO THE ADMINISTRATIVE
LAW JUDGE HONORABLE MICHAEL A. ROSAS**

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**EMPLOYER'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE
HONORABLE MICHAEL A. ROSAS**

I. INTRODUCTION

One day after the Employer discharged a group of stagehands from the Riviera Theatre (the "Shaw Crew"), the Union filed a petition to represent the regular, part-time stagehands at the Riviera Theatre, Vic Theatre, and Park West Theatre. (Stipulation of Facts ("Stip.") ¶ 11, Jt. Ex. 2.) The next day, the Union filed an unfair labor practice charge alleging that the Employer had discharged the Shaw Crew in retaliation for protected activity. (Stip. ¶ 12, Jt. Ex. 3.) The General Counsel issued a complaint based on the allegations in the unfair labor practice charge. (Jt. Ex. 4.). The Employer denied the allegations, but nonetheless agreed to settle the case and restore the employees to the on-call list for stagehand work at the Riviera Theatre.

Pursuant to the Settlement Agreement, the Employer agreed to:

offer [the Shaw Crew] immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.

(Jt. Ex. 5, at R00212.) There was no requirement that the Shaw Crew be given any seniority or other preference over the stagehands who worked at the Riviera Theatre following the termination of the Shaw Crew. In fact, during settlement negotiations, the Employer repeatedly rejected any such preferential treatment and, as evidenced by the Settlement Agreement, the Region ultimately agreed to proceed with the settlement without any requirement that the Shaw Crew be given any seniority or other preferences over the existing crew.

Immediately following the Settlement Agreement, the Employer delivered a memorandum to the production manager for the Riviera Theatre (Behrad Emami) setting forth the operative language from the Settlement Agreement and directing that the Shaw Crew be offered work assignments in a non-discriminatory manner:

I want to emphasize to you that this is your responsibility, and that I expect you to carry it out completely and in every way. It is very important to me and to the companies that you do so. If you have any questions about what this means or how to do what I am requiring, then please let me know. To be clear, you may hire whomever you think is best and appropriate for jobs. But union support or membership, or lack of support or membership in the union, may not play *any* role – NONE – in the hiring decisions you make. *And*, you have to give fair consideration to [Shaw's] former crew. No doubt, you have people whom you're now using whom you know and trust. But in order to be fair to [Shaw's] former crew, I want you to make sure that you give people a chance – especially people who were most active in working Riv shows before September 21, 2015. (The first list below shows those who were most active at the Riv.) In order to show your and our good faith in this, I would like you to make a particular effort to choose among [Shaw's] former crew as stagehands for the immediately upcoming Riv shows on April 1 (if possible), 7, 14, 15 and 16. That will both help you get to know people you may not know, and will show that you and the companies are taking our obligation seriously. To be clear, though, this isn't just an April 2016 obligation. You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner.

(Stip. ¶ 19; Jt. Ex. 19 (the "Mickelson Memo") (emphasis in original).)

As shown in the Stipulation of Facts and summarized below, Emami (and the Employer) fully complied with the Settlement Agreement by offering the Shaw Crew work opportunities in a non-discriminatory manner. Emami documented his work offers and assignments, and his records show that members of the Shaw Crew were offered more work opportunities than the other stagehands. (Stip. ¶¶ 41-45, Jt. Exs. 19, 27, 28.)

The Region and the Union do not dispute this. Instead, they seek to "re-litigate" the settled claims by seeking relief that the Region did not obtain in the Settlement Agreement. Despite the fact that the Settlement Agreement contains no seniority requirement or special rights – because the Employer repeatedly rejected any such preferential treatment – the remedy the Region seeks is that the Employer be required to "assign work to the [Shaw Crew] in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority or benefits and/or to make the employees whole for any lost wages." (Jt. Ex. 1(b) p.3.)

The Region does not have a good faith basis to pursue this claim or to seek this remedy. There is no seniority requirement in the Settlement Agreement, and the Region and Union stipulated that the Employer “repeatedly rejected Region 13’s proposal that the Shaw Crew be reinstated with ‘seniority or any other rights and/or privileges previously enjoyed.’” (Stip. ¶ 17.)

The parties settled the underlying dispute; the Employer has complied with the Settlement Agreement; and this case should have never been brought. The Region previously admitted as much when it rejected the Union’s unfair labor practice charge. In his letter rejecting the charge, the Regional Director stated:

We have carefully investigated and considered your charge [and] [f]rom the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

(Stip. ¶ 39; Jt. Ex. 29.) Thus, after “careful investigat[ion]” the Region found no evidence that the Employer had breached the Settlement Agreement by refusing or failing to offer work to the Shaw Crew based on protected activity.

After the Union appealed this decision, the Regional Director changed course and filed this action. But the record was the same. The Regional Director identified no new facts that had been brought to his attention. The Complaint contains no *factual* allegations showing that the Employer breached the Settlement Agreement in any way, and the Stipulation is likewise devoid of any facts proving that the Employer refused or failed to offer work to the Shaw Crew work based on protected activity.

The only reason this action was brought is because, over the Union's objection, the Settlement Agreement did not give the Shaw Crew any seniority or other preference over the other stagehands, and the Region now apparently regrets settling the underlying dispute without such a requirement. But a change of heart by an agency is no basis for disregarding the terms of a settlement agreement. As the Supreme Court has held in analogous circumstances, when an agency settles a case, it is bound by the settlement regardless of whether the agency subsequently changes its views or contends that the terms do not further the agency's purposes:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681–82 (1971).

As in *Armour*, the Settlement Agreement here represents a compromise of the parties' respective claims, defenses and positions. The Stipulation of Facts confirms that the Employer complied with the terms of the Settlement Agreement. The Region is not permitted to re-open the underlying proceedings or to re-negotiate the Settlement Agreement. This action should be dismissed.

II. STATEMENT OF THE CASE

A. Procedural History

On March 7, 2017, the parties' Joint Motion and Stipulation of Facts, consisting of 46 factual stipulations incorporating Joint Exhibits 1 through 33, was received as the entire record.

B. Facts

1. The Employer's Business.

Jam Productions, Ltd. ("Jam") located in Chicago, Illinois, is engaged in the business of promoting and producing concerts and events ("shows") at venues, including the Riviera Theatre, Park West Theatre, and Vic Theatre in Chicago, Illinois. (Stip. ¶ 2.) Event Productions, Inc. provides labor for shows at the Riviera and Vic theatres, including stagehands, who are part-time employees. (Stip. ¶ 3, 8.)¹ The stagehands "load in" equipment and material from the band and vendors to the venue before the show, and "load out" those items after the show ends. Stagehands are assigned the "load-in" and/or the "load-out," or assigned "all day" as needed to, for example, change set-ups if multiple bands perform. The size of the stagehand crew for a particular show varies depending upon the scope of work for the show. The 35 timesheets in the record covering all shows at the Riviera from April 9, 2016 to December 30, 2016, reflect a median stagehand crew size of nine per show during this period. (Jt. Ex. 28.)

2. The Shaw Crew.

Prior to September 16, 2015, the Riviera Theatre employed Kevin Lynch ("Lynch") as production manager and Chris "Jolly Roger" Shaw ("Shaw") as a part-time crew manager for the stagehands. (Stip. ¶ 31.) Shaw reported to Lynch and/or Nick Miller (the head talent buyer). (Stip. ¶ 31.) For each show, Lynch would let Shaw know how many stagehands were needed (Stip. ¶ 28,

¹ For convenience, Jam and Event Productions will be referred to as the "Employer."

Jt. Ex. 25), and Shaw was responsible for offering and assigning work to the stagehands. (Stip. ¶ 31.) Neither Jam nor Event Productions authorized or requested Shaw to use a seniority system for stagehands or to provide stagehands with any privileges based on length of service. (Stip. ¶ 31.)²

On September 16, 2015, the Employer discharged Lynch, Shaw, and the Shaw Crew. (Stip. ¶ 6, 10.) The following day, the Union filed a petition with Region 13 to represent the regular part-time stagehands at the Riviera Theatre, Vic Theatre, and Park West Theatre. (Stip. ¶ 11, Jt. Ex. 2.) On September 18, 2015, the Union filed an unfair labor practice charge alleging that the Employer had discharged the Shaw Crew in retaliation for their protected activity. (Stip. ¶ 12, Jt. Ex. 3.) The

² While Shaw apparently would testify that he called his crew in order of seniority (Stip. ¶ 28, Jt. Ex. 25), the undisputed evidence from Shaw's own records is that Shaw actually did not call his crew in order of seniority. Chart 1 in the attached Appendix lists the individuals on the Shaw Crew identified by name in the Settlement Agreement (Jt. Ex. 5) by hire date and the number of shows they worked from September 22, 2014 to September 21, 2015, the one-year period preceding their discharge. Chart 1 is compiled from information in Joint Exhibits 33 and 26. Chart 1 shows that other than Shaw's four favorite stagehands, Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman (*see* Jt. Ex. 25, pp. 2, 10-11), Shaw did not assign work to stagehands based on their hire dates. Chart 1 shows that Shaw's four main stagehands worked from 36 shows (Yumping) to 60 shows (Kramer) during this period. However, other more recently-hired stagehands also worked a high number of shows, such as Gabe Thompson (47 shows, hired May 13, 2011), Ed Bilicki (46 shows, hired November 4, 2011), and Chris Leggett (34 shows, hired September 28, 2013). (For some unknown reason, Fred Darden was omitted from the Settlement Agreement, but he too is a more recent hire who Shaw had assigned to a high number of shows—30 shows, hired October 12, 2011.) On the other hand, Shaw assigned many of the longest-tenured stagehands only a handful of shows such as Joe Kelly (4 shows, hired June 30, 2002), Eric Pospishil (6 shows, hired November 2, 2003), Joe Lyons (2 shows, hired September 27, 2006), and Sean Gunn (6 shows, hired October 30, 2010).

On September 30, 2015, the Employer and the Union entered into a Stipulated Election Agreement. The stipulated voter list also belies the notion that Shaw made work assignments based on seniority. The parties stipulated that to be a "regular part-timer" and eligible to vote, members of the Shaw Crew had to have worked 18 or more shows over the one year period immediately preceding the payroll date ending October 4, 2015 (the "Prior One-Year Period"). (Stipulated Election Agreement, p. 2.) Chart 2 in the Appendix shows that there were stagehands on the Shaw Crew with more seniority who did not work at least 18 shows (and, therefore, were not eligible to vote) and stagehands with less seniority who worked 18 or more shows (and, therefore, were eligible to vote). At no time did the Employer authorize a seniority system for stagehands (Stip. ¶ 31), and there was and is no seniority system in practice.

General Counsel filed a complaint based on the allegations in the unfair labor practice charge. (Case No. 13-CA-160319; Jt. Ex. 4.) The Employer denied the allegations of the complaint.

3. The New Crew.

On September 22, 2015, Behrad Emami (“Emami”) replaced Lynch and Shaw at the Riviera Theatre. Emami was the new production manager but he also assumed responsibilities for offering and assigning work to stagehands. Emami has worked for Event Productions since approximately 2004, ultimately advancing to production manager in other venues, and he also had been a production coordinator and road manager for various artists’ tours. (Jt. Ex. 24, p 1.) Emami and the production manager at the Vic Theatre, Jason Plahutnik, created a list of stagehands from people they knew and worked with at area venues, and from their network of industry contacts. (Stip. ¶ 32, Jt. Ex. 24, p 2.) Emami started with a list of 25 to 30 stagehands, and added and dropped names from the list over time. (Jt. Ex. 24, pp. 2-3.) Emami knew that some of the Shaw Crew continued to work shows for Event Productions at other locations, and Emami initially began calling a few stagehands who had been members of the Shaw Crew. (Jt. Ex. 24, pp. 3-4.) However, Emami soon learned from members of the Shaw Crew that a legal matter was pending and that members of the Shaw Crew would not work at the Riviera Theatre until the matter was resolved. (Jt. Ex. 24, p 3.)

Emami produced his first show at the Riviera on September 25, 2015, and he assembled a crew of stagehands to work at this show. The same stagehands continued to work shows at the Riviera, and Plahutnik and Emami continued to develop the list of stagehands for the Riviera. Within a few weeks Emami “felt we had a good core group of employees.” (Jt. Ex. 24, p 3.)

During the next six months, from late September 2015 to late March 2016, Emami was “very satisfied” with his crew and its performance. He received positive feedback from multiple touring crews and management regarding their experience at the Riviera. (Jt. Ex. 24, p 4.)

C. The Settlement

Case 13-CA-160319 was settled without any hearing, findings of fact, or conclusions of law.

1. Overview of the Settlement.

On March 28, 2016, the Employer signed the Settlement Agreement resolving Case 13-CA-160319. (Jt. Ex. 5, R00211.) In the Settlement Agreement, the Region identified 44 stagehands from the Shaw Crew and calculated a back-pay amount of \$50,824.00. Four of them (Shaw’s core crew) received the bulk of the back-pay amount. (*Id.*, R00208-R00210.) The Settlement Agreement included a non-admission clause. (*Id.*, R00205.) As to future employment rights, the Employer agreed to offer the Shaw Crew “immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015, or if those jobs no longer exist, to substantially equivalent positions, without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.” (*Id.*, R000212.)

The Settlement Agreement was extensively negotiated. The Region initially proposed that the Settlement Agreement provide the Shaw Crew with seniority over the New Crew. Specifically, the Region repeatedly proposed that the Shaw Crew be offered “‘immediate and full participation in the on-call list’ ... *without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any.*” (Stip. ¶ 16, Jt. Exs. 6, 7, 8, 9, 11, and 12 (emphasis added).) The Respondents’ counterproposals repeatedly struck any language that the Shaw Crew would be

afforded any seniority or other preference upon their return. (Stip. ¶ 17, Jt. Exs. 13, 14.) Ultimately the Region agreed to the terms proposed by the Respondent, *i.e.*, without the seniority, rights and privileges language. For this reason, the Union objected to the settlement. On April 6, 2016, the Region approved the settlement unilaterally. (Stip. ¶ 22, Jt. Exs. 5, 20, 31.)

2. The Exchange of Proposals.

The Region sent the Employer its initial settlement agreement proposal on December 4, 2015. The Region proposed that the Respondents offer the Shaw Crew “immediate and full reinstatement to their former jobs and restore their names to the work assignment roster *in accordance with seniority*, or if those jobs no longer exist, to substantially equivalent positions, *without prejudice to their seniority or any other rights and/or privileges previously enjoyed.*” (Jt. Ex. 7, R00053 (emphasis added).) The Region’s January 14, 2016 proposal contained identical language. (Jt. Ex. 8, R00059.) The Region’s February 1, 2016 proposal contained identical language, and added that the Employer will “assign the above employees who accept reinstatement *... in a nondiscriminatory manner and consistent with their seniority.*” (Jt. Ex. 9, R00068-69 (emphasis added).)

On February 5, 2016, counsel for the Region, Union, and Employer met to discuss settlement. By this time, Emami and the New Crew had been working at the Riviera Theatre for four and a half months. The Employer’s counsel explained that the Employer “objected to discharging the New Crew or to giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew.” (Stip. ¶ 17.) Following the meeting, on February 5, 2016, the Employer sent the Region a counterproposal that deleted any requirement that the Shaw Crew be given any seniority rights over the New Crew. (Jt. Ex. 10, R00079.) On February 9, the Region sent another proposal that still included restoration of purported seniority rights and provided for “immediate

and full participation in the on-call list ... without prejudice to their seniority, rights and/or privileges previously enjoyed.” (Jt. Ex. 11, R00104.) The cover email from the Region’s attorney explained the Region’s position as follows:

Respondent proposed to delete references to reinstatement of seniority rights as to the alleged discriminatees. As explained during our meeting, the restoration of any existing seniority rights returns employees to the status quo and is necessary to make employees whole. However, Respondent is not bound to use an assignment method not currently used by crew chiefs in its employ.

(Jt. Ex. 11, R00099.)

In response, the Employer again struck the references to “seniority rights” and other “rights and/or privileges previously enjoyed” (Stip. ¶ 17; Jt. Exs. 13, 14.) The Employer’s February 24, 2016 proposal stated the Shaw Crew would be offered “immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the Union.” (Jt. Ex. 13, R00115.)

In its next proposal sent March 3, 2016, the Region reinserted the seniority language. (Jt. Ex. 12, R00129.) On March 15, 2016, the Employer sent the Region its proposal which once again rejected and struck any reference to any purported “seniority, rights and/or privileges” and once again proposed the Shaw Crew be offered “immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the Union and offer them work in a non-discriminatory manner.” (Jt. Ex. 14, R00154.) The cover email from the Employer stated in part:

We also took out the reference in the third WE WILL paragraph to seniority and other privileges previously enjoyed. JAM maintains no seniority list and does not provide any special privileges. Adding this language creates rights that do not exist. The crew chiefs have absolute and unrestricted authority to offer stagehands work. JAM is not involved. As required by the Act this paragraph states that the terminated employees will be returned to the on-call list without discrimination and offered work in a non-discriminatory manner. The Act does not require anything more under these circumstances.

(Jt. Ex. 14, R00149; *see also* Stip. ¶ 31.)

By this point-in-time, Emami had his crew in place at the Riviera for six months. To fill this crew, Emami had offered work to stagehands who were the most skilled and had the best work ethic and ability to work well with others. (Jt. Ex. 19, Jt. Ex. 24, p. 5.)

On March 16, 2016, the Region sent the Employer a revised settlement agreement with an email stating the Region had “made the revisions as proposed.” (Jt. Ex. 15, R00163.) The enclosed agreement included verbatim the Employer’s proposed language that the Shaw Crew would be offered “immediate and full participation in the on-call list for work of the type they performed at the Riviera Theater from October 4, 2014, to September 21, 2015, or if those jobs no longer exist, to substantially equivalent positions, without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.” (*Id.*, R00167.) This final proposed agreement from the Region omitted the “seniority,” “rights” and “privileges” language that the Region (and the Union) had repeatedly proposed from the outset of negotiations. In response to a follow-up email from Employer’s counsel, the Region counsel confirmed: “Yes the Region agreed with all of your changes as proposed.” (Jt. Ex. 16, R00175.)

The Employer subsequently sent the Region additional time sheets so the Region could finalize the back-pay calculation, the Employer signed the Agreement on March 28, 2016, and the Employer requested phone numbers for the Shaw Crew so they could be contacted to work. (Jt. Ex. 18, R00190; Jt. Ex. 22, R00203.)

3. The Union Objects to the Settlement.

On April 4, 2016, counsel for the Union sent the Region its objections to the settlement. (Jt. Ex. 20.) The Union objected to the removal of the seniority provision and refused to enter into the Settlement Agreement without it. The Region responded that it would unilaterally approve the

Settlement Agreement and the Union would have the opportunity to raise its objections on appeal. (Jt. Ex. 21.)³ On April 6, 2016, the Region signed the Settlement Agreement without the seniority, rights and/or privileges provision as a unilateral settlement over the objection of the charging party Union. The Union did not appeal.

D. The Shaw Crew is Restored to the On-Call List.

On March 28, 2016, Jerry Mickelson, the head of Jam (and one of the owners of the Riviera Theatre), sent a memorandum to Emami to let him know that the legal dispute relating to the Shaw Crew was being settled and that as part of the settlement he needed to offer the former Shaw Crew ““immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015 without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.”” (Jt. Ex. 19 (the “Mickelson Memo”).) Mickelson further stated:

[U]nion support or membership, or lack of support or membership in the union, may not play *any* role – NONE – in the hiring decisions you make. *And*, you have to give fair consideration to Jolly’s [Shaw’s] former crew.... this isn’t just an April 2016 obligation. You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner.

(Jt. Ex. 19 (emphasis in original).) Mickelson also directed Emami to keep a log of every offer of work (showing date the offer was made, name of person to whom offer was made, date of the work that was offered, and response to the offer). *Id.* Emami was provided a list of the stagehands included in the Settlement Agreement, identifying the “most active” members of the Shaw Crew

³ Neither Jt. Ex. 20 nor Jt. Ex. 21 was sent to the Employer’s attorneys at the time of the settlement. The first time the Employer’s attorneys saw these exhibits was on February 23, 2017, in connection with negotiating the Stipulation. (Stip. ¶ 21.) Any purported “interpretation” of the Settlement Agreement reflected in these communications between the Region and the Union was not shared with the Employer’s attorneys.

(the “regular part-timers,” who the parties had stipulated were eligible to vote), and the “additional crew available to work,” (the less frequent part-timers who the parties had stipulated were not eligible to vote). *Id.*⁴

Emami understood that he was required to give the Shaw Crew “full participation in the on-call list.” (Jt. Ex. 24, p. 4.) Emami had no specific instructions other than he should make a special effort to use the members of the Shaw Crew listed as “most active.” He understood he “should be fair” and allow the Shaw Crew “to be equally involved.” *Id.* To implement Mickelson’s instructions, Emami “generally work[ed] toward hiring the current crew and the Chris Shaw crew in equal shares.” *Id.* He began by making telephone calls or sending text messages offering jobs to fill the crew. The number of offers he needed to make varied depending upon the size of the crew, availability, and response time. (*Id.*, p. 8.) It was easier to track and allocate the slots evenly for both crews for smaller shows. For larger shows Emami would fill slots according to who accepted the offer first because he needed to be sure the show was fully staffed. (*Id.*, p. 9.)

⁴ Forty-four stagehands were included in the Settlement Agreement. (Jt. Ex. 5, R00209-210.) The “most active” included the 19 regular part-timers on the Shaw Crew who had worked 18 or more shows during the Prior One-Year Period. (See note 2, *supra*, and Appendix, Chart 1.) The remaining 25 “additional” crew” were not regular part-timers because they had worked fewer than 18 shows during the Prior One-Year Period. (*Id.*) Many on the list of “additional” crew had hardly worked, if at all. Fourteen of them had worked 5 shows or fewer during the Prior One-Year Period. (See Appendix, Chart 1 (e.g., Peter Falk, 0 shows; Mike Howe, 1 show; Cassandra Koziol, 1 show; Danny Alvarez, 2 shows; Quintin Muntaner, 2 shows; Joe Lyons, 2 shows; Tim Taylor, 3 shows; Tom Roszel, 3 shows; Eric Sanders, 3 shows; Lester Berry, 4 shows; James Bartolini, 4 shows; Joe Kelly, 4 shows; Mike Alvarez, 5 shows; Lou Svitek IV, 5 shows.) Three names, Brent Benson, Bertil Peterson, and Tom Roszel, were included in the list of “most active” by mistake. During the Prior One-Year Period, Benson had worked 15 shows, Peterson had worked 6 shows, and Roszel had worked 3 shows. (See Chart 1.) Benson and Peterson should have been listed with the “additional crew.” Roszel appeared on both lists and should have only been listed with the “additional crew.” (Jt. Ex. 19, p. 2.)

Emami kept a log identifying each show at the Riviera Theatre, the name of each person he contacted with an offer to work that show, how he contacted the individual (text or call), the date and time of the contact, whether the individual responded, and the individual's response. (Stip. ¶ 33; Jt. Ex. 27.) Emami's log covers all shows from April 7, 2016 (the first show after the Regional Director approved the settlement) through December 30, 2016.⁵ Emami's log highlights in yellow the "most active" individuals on the Shaw Crew who had worked at least 18 shows during the Prior One-Year Period. (Stip. ¶ 34.) Emami's log highlights in green the "additional" stagehands on the Shaw Crew who had worked fewer than 18 shows during the Prior One-Year Period. (Stip. ¶ 35.) The individuals on Emami's log with no highlights are employees who had been working for Emami at the Riviera before the Settlement, *i.e.*, the New Crew. (Stip. ¶ 36.)

E. Emami Offers More Work Opportunities to the Shaw Crew.

The Settlement Agreement required the Employer to "offer [the individuals listed] work in a non-discriminatory manner." (Jt. Ex. 5, R00212.) The stipulated evidence shows that the Employer made *more* offers to the Shaw Crew (the individuals listed in the Settlement Agreement) than to the New Crew.

For the show on April 7, 2016, Emami made offers to six members of the Shaw Crew and seven members of the New Crew, but the members of the Shaw Crew declined to work because they were unaware that the matter had been settled. (Jt. Ex. 24, pp. 3, 5-6.) For the next show on April 9, 2016, Emami contacted 19 individuals to fill 10 slots. He first called two individuals who were core members of Shaw's crew, Archie Yumping and Gregor Kramer; they both got back to him and accepted the offers. He filled the crew with 5 from the Shaw Crew and 5 from the New

⁵ There were no shows from June 11, 2016 to September 12, 2016 because the Riviera has no air conditioning and is closed during the summer. (Jt. Ex. 27.)

Crew. To fill the crew for this show, he made 13 offers to the Shaw Crew and six to the New Crew. (Jt. Ex 27.)

There were 35 shows from April 9 to December 30, 2016. To fill the call for these shows, Emami's call logs establish that he made more calls and sent more text messages to the Shaw Crew offering work than he did to the New Crew. (Jt. Ex. 27.) The call logs show that members of the Shaw Crew were either not available or did not accept offers more often than members of the New Crew. (*Id.*) Part of the reason for this is that some members of the Shaw Crew could not or would not work shows at the Riviera Theatre. (Stip. ¶ 46.) Even though he could have filled the slots with far less time and effort with the New Crew, Emami – in an effort to be even-handed in filling each show crew – made more calls and offers to members of the Shaw Crew. Altogether, Emami made more offers of work to members of the Shaw Crew for 21 shows, made more offers to members of the New Crew for 11 shows, and made the same number of offers to both crews for one show. (Jt. Ex. 27.) In sum, 53.92% of the offers to work were made to members of the Shaw Crew and 46.08% to the New Crew. (*Id.*; see Appendix, Chart 3 for a summary.)⁶

To make an apples-to-apples comparison, there were 19 members of the Shaw Crew who the parties agreed were “regular part-time” stagehands because they had worked 18 or more shows during the Prior One-Year Period. (See Appendix, Chart 1, and n. 6, *supra*.) These stagehands were identified as the “most active” Shaw stagehands along with three other names for a total of 22. (Jt. Ex. 19, p. 2; see note 4, *supra*.) Using all 22 of the “most active” Shaw stagehands, and 25 as the low end size of the New Crew, the combined regular crews (Shaw Crew plus New Crew)

⁶ Chart 3 shows the totals and percentages. The offer totals were calculated from Joint Ex. 27, Emami's offer log for the first show after the Shaw Crew was restored to the on call list (April 7, 2016) through the last show of 2016 ((December 30, 2016). The number of offers to the Shaw Crew are based upon a count of the highlighted names in Jt. Ex. 27. The number of offers to the New Crew are based upon a count of the names not highlighted in Jt. Ex. 27.

included a total of 47 ($22+25=47$) individuals. The regular Shaw Crew made up 47% of the combined regular crew ($22\div47=47\%$), so if members of the combined regular crew had been offered jobs randomly, the regular Shaw Crew would have been expected to receive 47% of the offers, while the members of the New Crew would have expected to receive 53% of the offers ($25\div47=53\%$). Yet as noted above, Shaw's Crew received 54% of the offers—*more than the expected percentage* from random selection.

F. Emami Offers Shaw's Four Main Stagehands a Higher Number of Work Opportunities.

Emami's log (Jt. Ex. 27) also establishes that Shaw's favorite stagehands, Gregor Kramer, Paul Repar, Justin Huffman, and Archie Yumping (Jt. Ex. 25, p.2.) were offered work by Emami 23, 17, 18, and 10 times—more often than the expected percentage from random selection.⁷ There were 603 offers to work extended to the regular stagehands. (Jt. Ex. 27 and Appendix, Chart 3.)⁸ If Emami had selected from the "regular" stagehands randomly, a stagehand would have been expected to receive 13 offers to work. The fact that Shaw's favorite stagehands were contacted to work more often further negates the Region's contention that the Employer discriminated against the Shaw Crew in making offers to work.

Moreover, Huffman was an outspoken Union supporter. (Stip. ¶ 43.) Emami contacted Huffman to work the first few shows after the settlement. For the first show on April 9, 2016,

⁷ Yumping stopped responding to Emami's texts and calls after the April 9, 2016 show and, so, Emami eventually stopped contacting him. (Stip. ¶ 46; Jt. Ex. 27.)

⁸ Emami's timesheets show that sometimes, but infrequently, he also contacted members of Shaw's "additional" stagehands who were not regular part-timers. (Jt. Ex. 27) ("additional" stagehands highlighted in green). 85 offers were made to the "additional" stagehands. Thus, as depicted in Chart 3, there were a total of 688 offers (603 to regular stagehands and 85 to additional stagehands).

Emami's log notes state that Huffman "questioned many practices, procedures." (Jt. Ex. 27, p.1.) Huffman told Emami he understood (incorrectly) that *all* crew spots were supposed to be designated for the Shaw Crew; Emami responded (correctly) that both crews were allowed to work and he would try to get a fair split between the two groups. (Jt. Ex. 24, pp. 9-10.) Emami's log notes for the April 16 show state that Huffman "was difficult with non-Jolly [*i.e.*, Shaw] crew." (Jt. Ex. 27, p.2.) Despite his difficulty, Emami still offered Huffman work 18 times—more than would be expected by random selection.

G. Emami's Timesheets Show He Assigned Work Fairly.

The stagehand time sheets turned in by Emami April 9 to December 30, 2016,⁹ show that the Shaw Crew filled 151 of 327 slots or 46% of the call, and the New Riviera Crew filled 175 slots or 54% of the call, excluding John Booher. (Stip. ¶ 37; Jt. Ex. 28.)¹⁰ The Shaw Crew filled more slots for 5 shows, the New Crew filled more slots for 12 shows, and the number of slots filled by both crews was equal for 18 shows. Of the "all day" slots, excluding Booher, the Shaw Crew filled 48% or 69 of 144 "all day" slots, and the New Crew filled 52% or 75 of 144 slots.¹¹

⁹ Again, yellow highlights show employees on the regular Shaw Crew who worked, green highlights show employees on the additional Shaw Crew who worked, and individuals with no highlights are employees from the New Crew who worked.

¹⁰ Booher worked every show as Emami's stage manager/lead stagehand. (Jt. Ex. 24, pp. 7-8; *see* Jt. Ex. 28, identifying Booher as "stage manager.") As stage manager and lead stagehand, Booher also initially contacted stagehands from the list Emami prepared, though Emami assumed these duties himself before the settlement. (Jt. Ex. 24, p. 3.) Emami relied upon Booher because Emami needed to dedicate himself to the technical aspects of the show and did not have a crew manager. (Jt. Ex. 24, p. 3.) In contrast, before September 16, 2015, the Riviera had both a production manager (Kevin Lynch) and crew manager (Chris Shaw). Shaw's timesheets include himself as crew chief. (Jt. Ex. 26.) Emami's timesheets include Booher as stage manager. (Jt. Ex. 28.)

¹¹ For the show on May 28, 2016, four members of the New Crew were assigned the all-day slots. Emami was not at the Riviera Theatre that day. Jason Plahutnik worked in his place and made the assignments. (Jt. Ex. 24, p. 8.)

Appendix, Chart 3. The filling of the all-day slots was affected by time restrictions expressed by individual stagehands. On numerous occasions, members of Shaw's Crew told Emami they were not available all day, but could work load-in/load-out, or just load-in or just load-out. (Jt. Ex. 27.)¹²

The fact that Shaw's Crew refused work more often than the New Crew accounts for the difference between the percentage of offers made to Shaw's Crew and the percentage of slots filled by that crew. The Settlement Agreement required Jam to *offer* work without discrimination, and that is what Emami did. But he could not make Shaw's Crew accept those offers. The 46% of slots filled by Shaw's Crew is exactly what was expected by random selection from Shaw's regular crew, and the 48% of all day slots exceeded what was expected by random selection.

It is also significant that shows staffed by Emami required fewer stagehands than shows staffed by Shaw. As noted, the median crew size hired by Emami is 9.¹³ The median crew size

¹² Joint Exhibit 27, the Call Log, records that individuals responded to job offers either by confirming their availability generally or by stating they were available only for part of the day (load-in/load-out, load-in, or load-out). For example, for the Courtney Barnett show on April 28, 2016, Paul Wright and Tom Roszel, regular members of Shaw's Crew, responded to job offers by stating they were not available all day, and were available for load-out only. In response to job offers, regular members of the Shaw Crew stated they were not available for all-day work on numerous other shows including Father John Misty, A&O Ball, Amon Amarth, At the Drive-In, The Kills, Mudcrutch, Sturgill Simpson, Macklemore, RuPaul's Drag Race, Volbeat, Local Nations, Glass Animals, Opeth, Ingrid Michaelson, Rae Sremmurd, Elle King, The Naked and Famous, Zemfira, and Umphrey's McGee.

¹³ The median size of Emami's crew is calculated based upon the timesheets he submitted from April 9, 2016 to December 30, 2016. (Jt. Ex. 28.) A median is used instead of a mean because a few shows had a very high number of stagehands due to the size and complexity of the show. *See e.g.*, Mud Crutch on May 28, 2016 and Macklemore & Ryan Lewis on June 9, 2016. Boohar is included in calculating the median.

hired by Shaw was 14.¹⁴ This means that post-settlement, there were fewer slots to fill for each show.

H. The Subsequent Legal Proceedings.

On June 7, 2016, the Union filed an Unfair Labor Practice Charge alleging that the Employer had breached the parties' Settlement Agreement. Specifically, the Charge stated:

[T]he above-named employer has been failing and refusing to offer the employees named as discriminatees in the complaint and settlement agreement in that case full participation in the on-call list because of their protected, concerted, or union activity; in retaliation for their being named discriminatees in the complaint and settlement agreement; and in violation of the terms of the settlement agreement.

(Jt. Ex. 1(a).)

On July 13, 2016, the Region sent the parties a letter stating that it had "carefully investigated and considered the [Union's] charge," and had decided to dismiss. (Stip. ¶ 38; Jt. Ex.

29.) The Regional Director's dismissal letter goes on to state:

From the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

(Stip. ¶ 38; Jt. Ex. 29.) The Union appealed.

¹⁴ The median size of Shaw's crew is calculated based upon the timesheets he submitted from September 22, 2014 to September 21, 2015. (Jt. Ex. 26.) To calculate the median, the employees identified as a runner, hospitality, production (Kevin Lynch) are not counted because they are not stagehand positions. Shaw or whoever was designated crew chief is included in calculating the median just like Booher is included in calculating Emami's median crew size (although time spent calling and filling slots is also excluded). Shaw's timesheets also show that for some reason Huffman often logged extremely long days, beginning early in the morning. (Jt. Ex. 26.)

Several months later, on October 19, 2016, the Regional Director sent the parties a letter stating that he had treated the Union's appeal as a request for reconsideration and that "[u]pon review of the positions of the parties and further evaluation of newly submitted evidence, I have determined that additional proceedings are warranted." (Jt. Ex. 30.) The Regional Director did not identify any new evidence he relied upon or explain the basis for his decision to revoke his dismissal of the Charge.

On October 28, 2016, the Acting Regional Director issued a Complaint and Notice of Hearing alleging that the Employer had "failed to offer and assign work on a non-discriminatory basis" to the individuals named in the Settlement Agreement. (Jt. Ex. 1(b), p. 3, ¶¶ VII(a) & VIII.) The Region alleges "discrimination" in conclusory terms. The Complaint omits any reference to the operative language in the Settlement Agreement governing the Employer's obligation to offer work, which only requires the Employer to "offer [the alleged discriminatees] immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the union, and offer them work in a non-discriminatory manner." (Jt. Ex. 5, at R00212.)

On October 31, 2016, the Regional Director sent the Employer a letter stating that the conduct alleged in the Complaint "constitutes a default of the terms of the Settlement Agreement that was reached in Case 13-CA-160319." (Jt. Ex. 32, at R00229.) Neither the Complaint nor the Regional Director's letter provides any notice of what the Employer allegedly did or failed to do in breach the Settlement Agreement.

Despite the fact that the Employer repeatedly rejected the Regions' proposed seniority, rights and/or privileges language – and despite the fact that everyone understood that under the Settlement Agreement both crews would participate in the on-call list and the Shaw Crew was not

entitled to any preferential treatment over the New Crew – the Region now seeks as a remedy that the Employer “assign work to the [named employees] in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority or benefits and to make the employees whole for any lost wages.” (Jt. Ex. 1(b), pp. 3-4.) But the Region is precluded from seeking such relief. There is no seniority requirement in the Settlement Agreement, and Region has stipulated that the Employer “repeatedly rejected Region 13’s proposal that the Shaw Crew be reinstated with ‘seniority or any other rights and/or privileges previously enjoyed.’” (Stip. ¶ 17.)

On November 14, 2016, the Employer filed its Answer to Complaint, denying the material allegations and raising the following affirmative defenses:

1. Jam and Event Productions have complied with the March 2016 Settlement Agreement.
2. The General Counsel’s requested remedies are all improper because the remedies breach the March 2016 Settlement Agreement.
3. The Charging Party waived any right to challenge the March 2016 Settlement Agreement by failing to appeal.

III. ARGUMENT

In deciding whether to compromise and settle, parties make judgments as to litigation risks, *i.e.*, the quality of the evidence and the relative strengths and weaknesses of the case, and take into account the cost and inconvenience of litigation. *Armour & Co.*, 402 U.S. at 681. In this case, after taking these factors into account, the parties engaged in intensive and protracted back and forth settlement negotiations that culminated in a settlement. The Employer would not agree to settle on terms that would either displace the New Crew or give the Shaw Crew any seniority rights or other special rights and privileges. The Region ultimately dropped these demands. But the settlement

provided a reasonable remedy to the Charging Party. The Employer agreed to pay back-pay and agreed to provide the Shaw Crew immediate and full *participation* in the on-call list.

The Complaint alleges in conclusory terms that beginning on March 28, 2016,¹⁵ Jam “failed to offer and assign work on a non-discriminatory basis” to the Shaw Crew. (Jt. Ex. 1(b)), p.3, ¶ VII(a).) The Complaint mentions the settlement (*id.* ¶ VIII), but fails to attach the Settlement Agreement, quote the relevant language in the agreement, or even refer to the terms that set the obligation of the Employer to offer work to the Shaw Crew in a non-discriminatory manner.

To determine whether there has been a breach of the Settlement Agreement, the starting point is a determination of the rights the Shaw Crew was conferred in the agreement. In the Settlement Agreement, the Employer agreed only to “offer [the Shaw Crew] immediate and full participation in the on-call list ... without discrimination because of their Union membership or support for the Union, and offer them work in a non-discriminatory manner.” The plain meaning establishes that the Shaw Crew was to “participate” on the on-call list and it does not grant any preferences to, or permit any discrimination against, the Shaw Crew. What it means to participate in the on-call list is further shown by the stipulated facts describing how stagehands are offered work. *See Windward Roofing and Construction Co., Inc.*, 342 NLRB 774, 775 (2004) (“judge found that it was necessary to consider extrinsic evidence as to what the parties meant by this language”). The negotiations and the exchange of proposals make clear that the Shaw Crew was

¹⁵ March 28, 2016 is *before* the effective date of the Settlement Agreement. (Jt. Ex. 5, R00206 (“Performance by the Charged Parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Parties of notice that no review has been requested or that the General Counsel has sustained the Regional Director.”).) The earliest of those dates is April 6, 2016, the date on which the Regional Director approved the Agreement. (*Id.* at R00207.)

conferred the same right to work as the New Crew – nothing more and nothing less. The Employer consistently and emphatically would not agree to discharge the New Crew, or agree to a settlement that gave the Shaw Crew any seniority or preferential treatment. (Stip. ¶ 15-17.)¹⁶ Ultimately, the Region agreed to drop these demands in their entirety (Stip. ¶ 18), and the Settlement Agreement does not provide for any seniority or preferential treatment. (Jt. Ex. 5 at R00212.)

Because the parties entered into a Settlement Agreement, that agreement controls, and the only question is whether the Employer has complied. By entering into the Settlement Agreement, the parties waived any factual and legal arguments that they might have otherwise made in the litigation, and gave-up demands made earlier in the negotiations. *Armour*, 402 U.S. at 681–83 (“the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation”); *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975) (“[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.”).

Thus, neither the General Counsel nor the Union can now be heard to argue that the Shaw Crew “should have” been restored to the on-call list with seniority or offered special rights or privileges by virtue of their prior employment at the Riviera. By agreement, the Employer is not required to give any preferential treatment to the Shaw Crew. All that is required is that Jam offer “immediate and full participation in the on-call list...without discrimination because of their union

¹⁶ Despite the written assurance from the Region’s attorney that “Respondent is not bound to use an assignment method not currently used by crew chiefs in its employ” (Jt. Ex. 11, R00099), the Employer still insisted that all references to seniority and other rights and privileges be stricken from the agreement and always made clear that it would not settle if the agreement provided any seniority or preferential rights to the Shaw Crew. (Stip. ¶ 15-17.)

membership or support for the Union...and offer them work in a non-discriminatory manner.” (Jt. Ex. 5, R000212.) The stipulated evidence shows that the Employer complied with the Settlement Agreement and there was no discrimination. In fact, as shown below, the Employer went above and beyond its obligations under the Agreement.

A. There Was No Discrimination.

The General Counsel and the Union bear the burden of proving discriminatory conduct. 29 U.S.C. §160(c). As shown in the Stipulation of Facts, neither the General Counsel nor the Union have come forward with an iota of evidence that the Employer refused or failed to offer work assignments to the Shaw Crew based on protected activity. There is no testimony or documentary evidence that reflect any discrimination or intent to discriminate against the Shaw Crew. To the contrary, the Mickelson Memo and the Emami Affidavit show just the opposite.

(Stip. ¶¶ 19 and 26; Jt. Exs. 19 and 24.)

The Employer specifically instructed the Riviera Production Manager, Emami, as follows:

[U]nion support or membership, or lack of support or membership in the union, may not play any role – NONE – in the hiring decisions you make. ... And, you have to give fair consideration to [Shaw’s] former crew this isn’t just an April 2016 obligation. You must make sure that you continue to hire stagehands in a completely non-discriminatory manner.

(Stip. ¶¶ 19 and 26; Jt. Exs. 19 and 24.)

The Stipulation of Facts shows that Emami fully complied with these instructions (and the Settlement Agreement) and was completely even-handed in making work offers. (Stip. ¶¶ 25, 26, 33-37; Jt. Exs. 24, 27 and 28.) In fact, Emami made more offers to the Shaw Crew on both an absolute and relative basis. (Stip. ¶¶ 33-37; Jt. Exs. 27 and 28.)

1. The Shaw Crew Received More Offers to Work than the New Crew.

Once the Settlement Agreement was approved by the Regional Director, Emami began to offer work equally to the Shaw Crew and the New Crew on a non-discriminatory basis.¹⁷ In fact, as shown above, the Employer made *more offers of work to the Shaw Crew than to the New Crew*. Specifically, Emami made 54% of his offers to the Shaw Crew, while only 46% to the New Crew. (Jt. Exs. 27, 24 p. 5; see Section II.E, *supra*.) He spent more time and effort offering work to the Shaw Crew because they did not accept offers of work as frequently as the New Crew. (Stip. ¶ 46; Jt. Ex. 27.) Consistent with the Mickelson Memo, Emami spent this extra time in order to be even handed and fair to the Shaw Crew. He did this even though he had already developed a good crew in the New Crew and was very satisfied with their performance, as were the bands who performed at the Riviera. (Jt. Ex. 24, p. 4; Stip. ¶ 19; Jt. Ex. 19.)

2. Shaw's Crew Received More Offers to Work than Would Have Been Expected by Random Selection.

The Shaw Crew received *more offers to work* than would be expected statistically and were *more likely* to be offered work than the New Crew. As explained above, the regular Shaw Crew made up 47% of the combined crews ($22 \div 47 = 47\%$), so if members of the combined crew had been offered jobs randomly, the regular Shaw Crew would have been expected to receive 47% of the

¹⁷ The Complaint does not include any factual allegations to support the Region's empty conclusion that the Employer breached the Settlement Agreement. So the Employer is left to speculate as to what the Region will argue in its brief. However, if the General Counsel takes issue with the fact that Emami tried to equally allocate offers between the Shaw Crew and the New Crew, Emami's method can only be considered as a good faith effort to comply with the Settlement Agreement and to ensure equal treatment to Shaw Crew. Keeping track of which stagehands were included in the Settlement Agreement – so that they would be offered work at least as often as the New Crew – facilitated compliance with the Settlement Agreement by serving as a reminder to treat the Shaw Crew fairly and aided Emami in offering work to stagehands evenly. The results and offers made and slots filled prove that keeping track of offers and assignments to each of the two crews was not an act of discrimination.

offers, while the members of the New Crew would have expected to receive 53% of the offers ($25 \div 47 = 53\%$). Yet, the Shaw Crew received 54% of the offers—*more than the expected percentage* from random selection. (See Section II.E, *supra*.) This, too, proves there was no discrimination.

3. Shaw’s Crew Filled More of the All-Day Slots and the Same Number of Other Slots on a Statistical Basis.

Even though Shaw’s Crew often turned down opportunities for all-day work (Jt. Ex. 27), they still filled 48% of the all-day slots, which exceeded the 47% expected by random selection. (Stip. ¶ 37; Jt. Ex. 28; *see* Section II.G, *supra*.) Likewise, because of Emami’s extra efforts to make more offers to the Shaw Crew than the New Crew to ensure even-handed treatment, the Shaw Crew filled 46% of the total slots (*id.*), which is exactly what is expected by random selection even though several of the regular members of the Shaw Crew “cannot or will not work shows at the Riviera: Archie Yumping stopped returning. Emami’s texts and/or calls [offering work]; Gabriel Thompson relocated to another state; Brent Benson has a serious medical condition that prevents him from working; and Brad Sikora passed away.” (Stip. ¶ 46.)

4. The Four Stagehands Who Had Worked the Most Under Shaw Received More Work Offers from Emami.

The offers made to Shaw’s favorite stagehands also negates any claim of discrimination. Shaw had four main stagehands who worked the most shows when he was Crew Chief—Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman. (Jt. Ex. 25, p.2.) Except for Yumping – whom the parties stipulated refused to work shows at the Riviera and stopped responding to Emami’s job offers (Stip. ¶ 46) – Shaw’s main stagehands received more offers than what would be expected statistically, just as they did when Shaw was crew chief. (Jt. Ex. 27; *see* Section II.F, *supra*.)

Huffman is a particularly instructive example because he was an outspoken union supporter. He distributed union authorization cards, was the sole member of the Shaw Crew to appear at the Representation Case hearing, and was the Union's sole observer at each of the two sessions of the representation election. (Stip. ¶ 43.) Yet Emami offered him work 18 times, even after Huffman had been "difficult with non-Jolly crew" (Jt. Ex. 27, p.2)—*i.e.*, he did not work well with others, one of Emami's three criteria for selecting stagehands.

5. All the Stagehands from Both Crews Were Disappointed in the Fewer Work Opportunities after the Settlement.

It was natural that the Shaw Crew was and is disappointed with the amount of work they received after the settlement. They were forced to compete not only with a larger pool of stagehands (the combined New Crew and Shaw Crew), but also for a smaller piece of a smaller crew (nine stagehands per show under Emami compared to 14 stagehands per show under Shaw). But the Settlement Agreement did not guarantee the Shaw Crew the same amount of work and did not provide them with any preferential treatment over the New Crew. The New Crew also was unhappy with the reduced opportunity to work when the two crews were combined, but they understood that the Employer had settled the case concerning the Shaw Crew and that, per the Settlement Agreement, both crews would participate in the on-call list. (Jt. Ex. 24, p. 4.)

There is no evidence that the Employer breached the Settlement Agreement by failing to offer and assign work on a non-discriminatory basis. All of the stipulated evidence is to the contrary. The General Counsel and the Union cannot meet their burden to show discriminatory conduct, and the case should be dismissed.

B. The Employer Was Not Required to Offer Work by Seniority.

If the General Counsel and the Union argue that the Employer breached the Settlement Agreement by not assigning work according to seniority, there are two short answers.

First, the Settlement Agreement plainly does not require use of seniority, and there is no room for ambiguity. During the settlement negotiations, when the Region proposed seniority, it did so explicitly – and repeatedly. (*See, e.g.*, Jt. Exs. 6, 7, 8, 9, 11 and 12.) Had the parties intended to mandate seniority or preferential treatment for the Shaw Crew, they would have done so explicitly. *See Windward Roofing & Construction Co.*, 342 NLRB 774 (2004) (where there was a preferential rehire list). That the parties did not include any such language in the Settlement Agreement is dispositive where the Region and the Union had repeatedly proposed including seniority rights and other preferences in the Settlement Agreement but the Employer repeatedly rejected any language conferring seniority or preferential rights and made clear it would not settle on those terms. *See Armour & Co.*, 402 U.S. at 682 (“the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it”).

Second, the negotiating history of the Settlement Agreement shows that the Region and the Union repeatedly sought to include a seniority requirement, that Jam stated the Shaw Crew would not be afforded any seniority or preferential rights, and that when the Region finally agreed to delete the seniority and preferential rights provision in order to get a settlement, the Union objected and refused to sign. Indeed, the Region has stipulated that the Employer “repeatedly rejected Region 13’s proposal that the Shaw Crew be reinstated with ‘seniority or any other rights and/or

privileges previously enjoyed.’” (Stip. ¶ 17.)¹⁸ The deletion of the hotly-contested seniority requirement from the Settlement Agreement means there is no such requirement, as the Union, which refused to sign the Agreement without that provision, and the Region and General Counsel well know.

The Employer reasonably relied upon the deletion of the proposed seniority provision as meaning there was no seniority requirement. That reliance interest must be protected. The Region cannot be permitted to apply its own after-the-fact interpretation to completed conduct that took place at a time when the plain language of the Agreement clearly stated there was no seniority requirement. In fact, the Region dismissed the Union’s unfair labor practice charge, then reversed course and reopened the investigation after reviewing the Union’s appeal of the dismissal (which the Employer does not get to see), and then issued a Complaint which does not articulate any theory of discrimination. This kind of “gotcha” system is not the way a federal agency may or should act. For it violates due process. *Cf., De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (administrative decisions should be presumed to control only conduct arising after they take legal effect because the retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice/due process of the law); *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142 (10th Cir. 2016) (same).

As the Supreme Court held in an analogous context:

Because the defendant has, by the [agreed] decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be

¹⁸ In any event, the Stipulation of Facts shows that there was never any seniority system in the first place. While Shaw now says he made offers based seniority when he was crew chief, as explained above, his own records show he did not do so. (*See* n.2, *supra*; *see also* Appendix, Chart 1.) The stipulated facts also confirm that the Employer never authorized or requested Shaw to use a seniority system for stagehands or to provide stagehands with any privileges based on length of service. (Stip. ¶ 31.)

construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

See Armour & Co., 402 U.S. at 682.

C. The Employer Was Not Required to Offer the Shaw Crew the Same Amount of Work as Before the Discharge.

If the General Counsel and the Union attempt to argue that the Agreement required the Employer to assign work to Shaw's Crew in the same order and frequency as their work assignments were made prior to their September 21, 2015 discharge (as the prayer for relief in the Complaint seeks) that argument, too, is contrary to the Settlement Agreement and must be rejected.

First, the Employer was not required to offer the Shaw Crew the same amount of work as before the discharge, or, for that matter, any particular amount of work. The Settlement Agreement only requires that the Employer offer the Shaw crew full participation in the on-call list in a nondiscriminatory manner. As explained above, the law is clear that the Region cannot add new requirements to the Settlement Agreement after the fact.

Second, such a requirement would mean that the Shaw Crew would receive all the work and the New Crew would receive none. The Stipulation of Facts unequivocally shows that during the settlement negotiations, the Employer refused to discharge or displace the New Crew and rejected each and every proposal by the Region that would have given the Shaw Crew any seniority or preferences over the New Crew. The Region, the Union and the Employer all understood that the Shaw Crew and the New Crew would be assigned work together and the Shaw Crew would have no seniority rights or other preferences. The Union objected to the settlement for this very reason.

That the Shaw Crew must compete with a larger number of stagehands for a smaller number of jobs may explain their frustration and disappointment, but that is not grounds for finding a violation of the Settlement Agreement or the Act.

D. Great Dane Trailers and Its Analytical Framework Do Not Apply.

As the Supreme Court has held, a showing of discrimination is a necessary condition to support a claim under Sections 8(a)(1) and (3) of the Act. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-33 (1967). The General Counsel and Union bear the burden of proving that element of their claim. But as shown above, there is no evidence of discrimination and nothing in the stipulated record supports the conclusion that the Shaw Crew was not treated the same as the New Crew after the settlement.

As noted, to determine whether there has been discrimination, the starting point is a determination of what rights the Shaw Crew was conferred in the Settlement Agreement. The Settlement Agreement states that the Employer must offer the Shaw Crew members participation in the on call list without discrimination and offer them work in a nondiscriminatory manner. *But it does not say how Jam must do that so long as Jam does not discriminate against the Shaw Crew because of their support for the Union and related protected activities.* One thing it does *not* say or require is that Jam must consider seniority or give preferences to the Shaw Crew. To the contrary, the drafting history of the Settlement Agreement, the ultimate deletion of seniority and other preferences, and the Union's rejection of the Agreement show just the opposite: that Shaw Crew members were to be given offers of work without regard to their support of the Union, but were not entitled to any preferences and would be considered along with the other stagehands for work assignments.

Because there is no evidence of discriminatory conduct or effect, the analytical framework of *Great Dane* does not apply, and the case should end. However, we address *Great Dane* because we anticipate that the General Counsel and the Union will cite to it.

Under *Great Dane* and its progeny, “if the adverse effect of the discriminatory conduct on employee rights is ‘comparatively slight’, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.” 340 U.S. at 34.¹⁹ Under the “comparatively slight” standard, Emami’s method of offering stagehands work was justified by legitimate, substantial non-discriminatory reasons. First, Emami was able to run shows with nine stagehands instead of the 14 that worked when Shaw was the crew chief. As a result, there were fewer slots available. Second, the pool of active or regular stagehands from which Emami selected stagehands was more than twice as large (47 individuals) as it had been under Shaw (22 individuals). Third, the Shaw Crew members were not entitled to any preference by seniority or otherwise. These factors combined meant that a member of the Shaw Crew was likely, just by virtue of significantly more people competing for a significantly smaller number of slots, to have less work after the settlement. Fourth, there is no evidence that the members of the Shaw Crew were more skilled, harder working

¹⁹ See e.g., *Southcoast Hospitals Group, Inc.*, 363 NLRB No. 9 (2015), *vacated sub nom. Southcoast Hospitals Group, Inc. v. NLRB*, 846 F.3d 448 (1st Cir. Jan. 20, 2017) (giving preference to non-union employees over union employees when filling positions at non-union facilities analyzed under “comparatively slight” standard). There can be no credible argument that *Great Dane*’s alternative “inherently destructive” standard could conceivably have any bearing on this case. “Inherently destructive” conduct is “relatively rare,” *Boilermaker Local 88 v. NLRB*, 858 F.2d 756, 762 (D.C. Cir. 1988), and is reserved for egregious cases of discrimination, as evidenced by the cases in which it was not applied. *Roosevelt Memorial Medical Center*, 348 NLRB No. 64 (2006) (coercively interrogating employees about their intention to strike, and unilaterally implementing final contract proposals not “inherently destructive”); *Bud Antle, Inc.*, 347 NLRB No. 9 (2006) (delay in reinstating locked out employees who accepted offer of reinstatement and denial of overtime to returning formerly locked-out employees not “inherently destructive”).

or better team players than the individuals who were offered jobs. To the contrary, in Emami's view stagehands are "basically interchangeable;" in offering assignments, he sought the most skilled, hardworking and team-working individuals from the combined pool of stagehands. (Jt. Ex. 24, p. 5.) That Emami tried to split the work evenly between the two crews is the opposite of discrimination and shows that he gave the Shaw Crew *more* opportunities to work than would be the case if he offered work based strictly upon merit. Before the reinstatement of the Shaw Crew, Emami had developed a good crew, was very satisfied with their performance, and had received positive feedback from multiple touring crews and management regarding their experiences at the Riviera. (*Id.*, p. 4.) Despite Emami's positive experience with the New Crew, he faithfully followed the requirements of the Settlement Agreement and the Mickelson Memorandum. In trying to divide the work evenly between the two groups, he statistically advantaged Shaw's Crew members and put them on, at least, equal footing with the New Crew in offering work assignments.

This case is clearly distinguishable from the Board's decisions in *Legacy Health System*, 354 NLRB 337 (2009), *enforced*, 662 F. 3d 1124 (9th Cir. 2011), and *Southcoast Hospitals Group, Inc.*, *supra*, n.20. In *Legacy Health System*, the Board held that the employer violated Sections 8(a)(1) and (3) by prohibiting union employees from applying for part-time nonunion positions. In *Southcoast Hospitals Group, Inc.*, the Board held that the hospital system, which consisted of one unionized hospital and two non-union hospitals, violated Sections 8(a)(1) and (3) by maintaining a hiring/transfer policy that gave preference to unrepresented employees over represented employees when filling positions at its non-union facilities.²⁰ While the Board found

²⁰ The First Circuit vacated and remanded because in determining whether discrimination existed, the Board failed to consider whether, given that non-union employees were not allowed to compete for openings at the unionized facility, "the ratio of material opportunities overall as compared to the number of people competing for those opportunities (and thus the chance of a

the union employees in *Legacy Health System* and *Southcoast Hospitals* were penalized with reduced employment opportunities based on their representational status, here the Shaw Crew was not penalized and was treated the *same* as the New Crew in competing for work – and in fact received more than their share of offers and more than their share of the most desired all-day jobs.

In any event, unlike *Legacy Health System* and *Southcoast Hospitals*, Emami's method of offering and assigning work was reasonably adapted to achieve legitimate business ends, *i.e.*, having a good, efficient crew while fulfilling the Employer's obligations under the settlement agreement. While the Board is free to reject a proffered business justification on the ground that it is illogical or not "reasonably adapted to the achievement of the legitimate end," *NLRB v. Brown*, 380 U.S. 278, 288 (1965), the Board "may not invalidate an employment policy that accomplishes a legitimate goal in a non-discriminatory manner merely because the Board might see other ways to do it." *Southcoast Hospitals Group*, 846 F.3d at 457.

given worker to benefit equally from his or her respective preference) is greater for non-union workers than for union workers." 846 F.3d at 456. The Employer has provided statistics here showing that the Shaw Crew received more offers and more all-day positions than would have been expected on a random basis. The evidence also shows that the Shaw Crew received more offers of work and all day jobs than would have been the case absent Emami's affirmative efforts to ensure they filled half the crew. The Region's apparent contention that there was a breach of the Settlement Agreement and that the Employer discriminated against the Shaw Crew not only is unfounded, it is completely belied by the Stipulated Facts and Exhibits.

IV. **CONCLUSION**

For the reasons stated above, the Complaint should be dismissed.

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
BEFORE THE DIVISION OF ADMINISTRATIVE LAW JUDGES**

JAM PRODUCTIONS, LTD. and EVENT)
PRODUCTIONS, INC.,)

and)

Case No.: 13-CA-177838

THEATRICAL STAGE EMPLOYEES)
UNION LOCAL NO. 2, IATSE,)

Complainant,)

APPENDIX

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**CHART 1: HIRE DATE AND NUMBER OF SHOWS WORKED
FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT**

Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Kramer, Gregor	3/15/1998	60
Yumping, Archie	10/25/1998	36
Huffman, Justin	11/1/1998	51
Repar, Paul	6/20/1999	40
Phipps, Chris	6/11/2000	19
Bulawa, Scott	11/12/2000	29
Glazebrook, Chris	4/22/2001	33
Wright, Paul	4/7/2002 (hired before)	41
Kelly, Joe	6/30/2002	4
Garrity, Tom	1/5/2003	12
Fritz, Jerry	10/19/2003	30
Pospishil, Eric	11/2/2003	6
Ross, Adam	7/8/2005	23
Benson, Brent	6/16/2006	15
Lyons, Joe	9/27/2006	2
Mangnall, Bryan	10/14/2006	30
Svitek, Lou	7/6/2007	26
Pollak, Martin	10/3/2008	11
Sikora, Brad	5/16/2009	41
Gunn, Sean	10/30/2010	6
Carter, Todd	4/15/2011	20
Fritz, Zach	4/15/2011	10
Mulvey, Mike	4/15/2011	21
Peterson, Bertil	5/13/2011	6
Thomson, Gabe	5/13/2011	47
Koziol, Cassandra	7/7/2011	1

Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Bartolini, James	10/8/2011	4
Berry, Lester	10/22/2011	4
Dombrovskis, Alek	10/22/2011	8
Bilecki, Ed	11/4/2011	46
Curry, Nick	4/21/2012	9
Sanders, Eric D	6/26/2012	3
Svitek IV, Lou	6/29/2013	5
Chambers, Chris	9/9/2013	20
Leggett, Chris	9/28/2013	34
Bauminis, Karlis	11/3/2013	9
Howe, Mike	1/23/2014	1
Alvarez, Mike	4/12/2014	5
McNulty, Joe	4/23/2014	9
Roszel, Tom	8/10/2014	3
Taylor, Tim	9/26/2014	3
Muntaner, Quintin	5/16/2015	2
Falk, Peter	6/6/2015	0
Alvarez, Danny	6/17/2015	2

**CHART 2: HIRE DATE AND NUMBER OF SHOWS WORKED
FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT**

MORE SENIORITY/FEWER SHOWS			LESS SENIORITY/MORE SHOWS			
Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015		Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Kelly, Joe	6/30/2002	4		Mangnall, Bryan	10/14/2006	30
Garrity, Tom	1/5/2003	12		Svitek, Lou	7/6/2007	26
Pospishil, Eric	11/2/2003	6		Sikora, Brad	5/16/2009	41
Benson, Brent	6/16/2006	15		Carter, Todd	4/15/2011	20
Lyons, Joe	9/27/2006	2		Mulvey, Mike	4/15/2011	21
Pollak, Martin	10/3/2008	11		Thomson, Gabe	5/13/2011	47
Gunn, Sean	10/30/2010	6		Bilecki, Ed	11/4/2011	46
Fritz, Zach	4/15/2011	10		Chambers, Chris	9/9/2013	20
Peterson, Bertil	5/13/2011	6		Leggett, Chris	9/28/2013	34
Koziol, Cassandra	7/7/2011	1				
Bartolini, James	10/8/2011	4				
Berry, Lester	10/22/2011	4				

**CHART 2: HIRE DATE AND NUMBER OF SHOWS WORKED
FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT (Cont'd)**

MORE SENIORITY/FEWER SHOWS		
Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Dombrovskis, Alek	10/22/2011	8

CHART 3: SUMMARY OF JOINT EXHIBITS 27 AND 28

	Shaw Crew		New Crew	
	#	%	#	%
Offers (Jt. Ex. 27)	371	$371 \div 688^{21} = 54\%$	317	$317 \div 688 = 46\%$
Worked All-Day (Jt. Ex. 28)	69	$69 \div 144^{22} = 48\%$	75	$75 \div 144 = 52\%$
Worked Load-in/Load-out (Jt. Ex. 28)	82	$82 \div 182^{23} = 45\%$	100	$100 \div 182 = 55\%$

²¹ 371 offers to Shaw Crew plus 317 offers to New Crew = 688

²² 69 members of the Shaw Crew worked all day and 75 members of the New Crew worked all day = 144

²³ 82 members of the Shaw Crew worked load-in/load-out and 100 members of the New Crew worked load-in/load-out = 182

CERTIFICATE OF SERVICE

The undersigned certifies that on April 24, 2017, I had electronically filed and served the **EMPLOYER'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE HONORABLE MICHAEL A. ROSAS** upon the following:

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